IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

RSA.No. 45 of 2004()

AS.232/2000 of III ADDITIONAL DISTRICT COURT (ADHOC), THRISSUR
OS.583/1993 of PRL.SUB COURT,THRISSUR

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APPELLANTS/APPELLANTS/DEFENDANTS

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1. KUNHAMMA, AGED 74 YEARS,
   W/O. NEYYAN LONA, CHELAKKARA VILLAGE,
   TALAPPILLY TALUK.

2. VARGHESE, AGED 48 YEARS,
   S/O. NEYYAN LONA, CHELAKKARA VILLAGE,
   TALAPPILLY TALUK.

3. THOMAS, AGED 46 YEARS, S/O. NEYYAN LONA,
   CHELAKKARA VILLAGE, TALAPPILLY TALUK.

4. JAMES, AGED 39 YEARS, S/O. NEYYAN LONA,
   CHELAKKARA VILLAGE, TALAPPILLY TALUK.

5. GEEVARGHESE, AGED 33 YEARS,
   S/O. NEYYAN LONA, CHELAKKARA VILLAGE,
   TALAPPILLY TALUK.

BY ADV. SRI.K.B.MOHANDAS
SRI.LELLULAL T.G.THUNDATHIL

RESPONDENTS: RESPONDENT/PLAINTIFF:

JOSE AGED 58 YEARS, S/O. KURIYEDATH
POULOSE, CHELAKKARA VILLAGE,
TALAPPILLY TALUK.

BY ADV. SRI.P.VIJAYA BHANU
SRI.BIJU ZACHARIA. M

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 27/09/2007, ALONG WITH RSA NO. 47 OF 2004 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

ORDER ON I.A.NO.107/04 IN R.S.A.NO.45/04

27.9.07 DISMISSED SD/- M.SASIDHARAN NAMBIAR
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. Nos.45 & 47OF 2004

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Dated this the 27th day of September, 2007

JUDGMENT

Appellants are the plaintiffs in O.S.1000/1992 and defendants in O.S.583/1993 on the file of Sub Court, Thrissur. Respondent is the defendant in O.S.1000/1992 and the plaintiff in O.S.583/1993. Both the suits were jointly tried by Sub Judge, Thrissur. As per the common judgment O.S.1000/1992 was dismissed and O.S.583/1993 was decreed. A decree was granted directing appellants to remove the pipe installed on the southern portion of the terrace within three months and appellants were restrained by a permanent prohibitory injunction from draining waste water from their bath room, latrine, kitchen etc. to the B schedule property or causing any nuisance to the respondent. Appellants challenged the decree and judgment before District Court, Thrissur inA.S.232/2000 and 233/2000. Learned District

Judge on reappreciation of evidence confirmed the findings of learned Sub Judge and dismissed the appeal. They are challenged in these second appeals. R.S.A.45/2004 is filed against the concurrent decree in O.S.583/93 and R.S.A.47/2004 against the concurrent decree in O.S.1000/1992. When the appeals came up for admission, notice before admission was issued and records were also called for. Respondent entered appearance in both the appeals.

2. Learned counsel appearing for appellants and respondent were heard.

3. The argument of learned counsel appearing for appellants is that even if appellants did not establish a right of easement by prescription to drain waste water through the property of respondent, they have a right of easement by prescription, to drain away the natural water from their property to the property of the respondent as the property of the appellants is on a higher

level and the property of the respondent is on a lower level and in such circumstance, the decree granted by the courts below is not sustainable.

4. Learned counsel appearing for respondent pointed out that as found by courts below, there is a public road on the north which is on a lower level than the plaint schedule property and the flow of water is from the higher level to the lower level and the natural flow of water from the property is towards the southern public road where there is a drainage and in such circumstance findings of the courts below are perfectly correct.

5. On hearing learned counsel appearing for appellants and respondent, I do not find any substantial question of law involved in the appeal.

6. The report of the Commissioner with the evidence establish that the property of the appellants is lying on a higher level than the northern public road. Therefore it was found that the natural flow of water from the plaint schedule

property is towards the north through the public road, where there is a drainage to drain away water from the plaint schedule property. This factual findings of the courts below were arrived at on appreciation of evidence. When examined as PW1, appellant himself admitted that the public road on the north is lying ½ feet lower than the property belonging to him and water from the building which is in existence flow through the northern public road. It was also admitted by him that pipes were installed on the top floor of the building in the plaint A schedule property in the front portion that is on the northern side. It is on this evidence courts below found that appellants did not establish a right of easement by prescription. That factual finding cannot be interferd with in exercise of the powers of this court under section 100 of Code of Civil Procedure. Moreover, when evidence of PW1 himself establish that there is no right of easement by prescription,

dismissal of O.S.1000/1992 and the decree granted in O.S.593/93 is perfectly correct. The appeal are dismised.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006